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COMMENTS IN OPPOSITION TO SB 432

By Roger M. Sullivan
February 16, 1999

1. **Introduction.** Good afternoon. My name is Roger Sullivan. I am a lawyer with the Kalispell firm of McGarvey, Heberling, Sullivan & McGarvey. I appear in opposition to Senate Bill 432. On its face, the bill appears to give relief to the worker injured by a latent disease such as asbestosis. The truth is that this bill is really a W.R. Grace relief bill which would in fact deny the latently injured worker their present rights; put the worker in a position where he would have to apply for bureaucratic relief that can take years to obtain; and substantially reduce the grievously injured worker's benefits. More importantly, from a public policy standpoint, it would allow W.R. Grace to avoid being held accountable for its acts; it would transfer the obligation for these injuries to occupational disease insurers, both in this particular instance, as well as insurers for other employers whose employees have been exposed to toxic chemicals. In order to meet this obligation retroactively imposed on insurers, Montana's employers would once again face the prospect of rate increases on their premiums.

We represent W.R. Grace mine workers and their family members who have been injured and killed by exposure to asbestos in the vermiculite ore, both at work and brought home on the clothes of the mine workers. The extent of this disaster is unprecedented both in terms of the human misery caused by W.R. Grace and by the deception carried out by Grace. Although Grace abandoned the Libby community in 1993, it has apparently returned to seek relief from the Montana legislature through SB 432. I have two objectives here this afternoon. First, I want to briefly describe to you the nature and extent of the wrongdoing done by W.R. Grace, the consequences of which this company seeks to avoid responsibility for through this legislation. Second, I want to emphasize to you the far-reaching implications of this proposed legislation and why it makes for bad public policy.

2. **History of asbestos knowledge.** Medical literature documenting asbestosis and other lung diseases resulting from exposure to work related exposure to asbestos has been reported in the professional medical literature in America since the turn of this century. A number of articles appeared in such periodicals as the Journal of the American Medical Association as well as industrial hygiene publications prior to 1950.

3. **Confidential state reports.** The vermiculite mine and mill in Libby had been in operation since at least the 1930s. The mining and milling process produced a

considerable amount of dust. In 1956 the Montana Board of Health issued a report based on its industrial hygiene study of the Libby facility. (See Tab 1.) That report informed the company of numerous air quality violations, numerous violations of standard industrial hygiene practices, and informed the company in unequivocal terms that: "The asbestos dust in the air is of considerable toxicity, and is a factor in the consideration of reducing dustiness in this plant." The report cited to the extant industrial hygiene literature and described the disease process set in motion by asbestos exposure.

For decades after the issuance of this report, the Zonolite Company and W.R. Grace withheld this critically important information from its workers, their families, and indeed the community of Libby. In fact, a number of similar reports from the Montana Department of Health followed, which reports were also explicit in their warnings regarding the toxicity of the asbestos in the dust and these reports were also withheld from the workers and their families. In fact, this sorry legacy was described by W.R. Grace's attorney, S.Y. Larrick, in a letter of November 25, 1967 (see Tab 2.) As conceded by Grace's attorney, the Montana Department of Health inspections from 1956 forward revealed that the asbestos content in the dust far exceeded allowable concentrations, and in fact the deadly dust concentrations increased over time.

Most troubling, both in terms of the deaths and human misery caused as well as relevant to this bill is W.R. Grace's response to its knowledge of the enormous health hazard posed by the asbestos in its vermiculite. In 1959, Dale McGarvey of my firm was chairman of the House Committee on Workman's Compensation. That legislative session succeeded in passing Montana's first Occupational Disease Act. In 1965, asbestosis was added as a compensable occupational disease. However, when the first employee from W.R. Grace filed for occupational disease benefits, W.R. Grace fought the claim tooth and nail. When the claimant, Lilas Welch, was finally able to get the matter to a public hearing in Kalispell in 1967 before Montana's Industrial Accident Board, W.R. Grace decided that it had best settle the claim. The company's rationale is revealing (see Tab 2, p. 2):

You might wish to seriously consider a compromise settlement in hopes of in this manner **avoiding the necessity of exposure** of all the more damaging aspects of our own situation in the hearings rooms . . .

...keep them out of the hands of the Industrial Accident Board and the general public . . .

...avoid having evidence presented which would reveal the extent and severity of the problem . . .

4. **Grace ignored the advice of its insurer.** Especially repugnant in the context of this proposed legislation is W.R. Grace's repeated decisions to ignore the advice of its insurer, typified by Maryland Casualty's letter to W.R. Grace dated December 16, 1969, which provides in relevant part as follows (see Tab3):

Certainly when an x-ray picture shows a change for the worse, that person must be told and that person must be gotten out of the environment which is aggravating his condition. Failure to do so is not humane and is in direct violation of federal law.

Notwithstanding the insurer's explicit advice to Grace, Grace chose to continue to put its already diseased workers into dusty conditions, as was recently proven during the November trial in which a Libby jury found that W.R. Grace wrongfully killed Margaret Vatland by allowing asbestos dust to go home on the clothes of her husband. (See, *Benefield v. W.R. Grace*, decided November 13, 1998.) Unfortunately, what W.R. Grace knew about the toxicity of its asbestos, and what Grace knew about the rampant extent of lung disease among its workers was kept secret from the workers, the workers' families and the community of Libby.

Ironically, now Grace asks you to shift the liability back to the workers' compensation insurer - - who was pleading to get the workers out of the dangerous dust.

5. **Percent of workers with disease.** Tab 4, entitled "Workers with Disease" sets forth W.R. Grace's own confidential compilation of the percentages of its workers who suffered from lung disease. According, to a confidential 1969 study by Grace, 17% of its workers with 1 to 5 years of service had lung disease, 45% of its workers with 10 or more years had lung disease, and 92% of its work force with 21 to 25 years of service suffered from lung disease.

6. **Grace's response to known health hazards.** Over the years Grace continued to violate applicable air quality standards for asbestos at its Libby facility. In fact, until closure in the 1990s it continued to ship its vermiculite products out of Libby with asbestos still in it. As indicated on Tab 5, Grace was aware that "any exposure to asbestos dust is hazardous", let alone the enormous amounts of asbestos that it was exposing its workers to. However, W.R. Grace did develop a truly outrageous strategy:

If we minimize [Libby employees'] exposure to a dust level not exceeding 5 mppcf chances are we may be able to keep them on the job until they retire, thus precluding the high cost of disability.

So although Grace hid the health hazards of asbestos exposure from its workers, and failed to comply with applicable air quality standards, it did develop a strategy that would at least keep its workers on the job until they retired, only to spend their last years gasping for air, but at least W.R. Grace could thereby avoid "the high cost of disability".

7. **Asbestos death - Libby workers.** And die they have - - by the score. Set forth at Tab 6 is a list of Libby workers whom we know have died from asbestos-related diseases. There are undoubtedly more. Unfortunately, there are also numerous family and community members who have suffered from asbestos disease and some that have died from asbestos exposure who are not included on this list of workers.

8. **Grace's response to OD claims.** One of the more cruel ironies of Senate Bill 432 is that it purports to be in furtherance of this state's policy of, "providing occupational disease benefits to workers through a no-fault system in a timely manner with minimal reliance on attorneys in the court system." And yet, quite the contrary has been the case with W.R. Grace. Illustrative of Grace's approach to the adjustment of occupational disease claims submitted by its employees is the case of Don Riley (*see* Tab 7.) Don Riley filed his OD claim in 1981. Grace denied liability, and the matter finally came to hearing in 1990. In 1991 a decision was finally reached determining that Don was entitled to benefits and medical expenses, ten years after the claim was filed.

9. **Public policy implications.** Although in many ways SB 432 appears as a private relief act for a single corporation, it also has much broader public policy implications. In fact, SB 432 is one large out-of-state corporation's Trojan horse which is being unwittingly wheeled into Montana by well intending legislators. On its face, it appears to benevolently extend the time period within which occupational disease claims must be presented for latent diseases, such as asbestosis. However, I have already attempted to show you the bowels of corporate corruption which reside in this hollow horse and the death and human misery that have resulted for the good people of Libby. But the dark specter of this bill doesn't end there.

Insurable risks are well understood by insurance companies and employers. The proposed amendments to Section 403 of the Occupational Disease Act open a Pandora's box of new risks, neither anticipated nor bargained for by Montana's insurers and employers. Montana's insurers, employers, and employees have all understood for years that their relative rights and liabilities are defined by the Occupational Disease laws in effect on the employee's last day of employment. (*See, e.g., Buckman v. State Fund*, 224 Mont. 318, 730 P.2d 380 (1986); and *Gidley v. W.R. Grace*, 221 Mont. 36, 717 P.2d 21 (1986)). Attempting to go back and retroactively amend the parties' contractual rights and remedies may well

benefit a single out-of-state corporation, but it will come a high cost in terms of the risks born by every business in the state of Montana, both large and small. The family ranch (and its insurer) in eastern Montana whose ranch hand applied herbicide in the 1970s and now suffers from some neurogenic disorder attributable to a toxic chemical in the herbicide will now face the prospect of claims long thought dead. And what about the logging companies in western Montana, who have been so vigilant in managing their insurable risks? The industrial diseases such as white finger and carpal tunnel syndrome, with their genesis from work years before, now once again spring into existence as viable occupational disease claims against Montana's logging companies. And even if my small business or your small business never face the prospect of claims for latent injuries in our work places, we know that we all face the prospect of increased workers' compensation and occupational disease costs when claims are submitted for whom the employer can no longer be found. The liability of Montana's uninsured employers' fund is significant. The prospect of launching off into the uncharted waters of the unlimited time provisions for filing claims contained in SB 432 is indeed daunting and ill-advised.

10. Conclusion. I earnestly believe that none of you would take issue with the proposition that our laws are intended to do justice for our people, the citizens of the great State of Montana. I have attempted to demonstrate that this law is not just. Even if passed, in my opinion it suffers from grave constitutional infirmities, including violation of our constitution's contract clause, the prohibition on the enactment of *ex post facto* laws, Article 2 Section 16's guaranties of access to the courts and remedies of injured workers, as well as due process and equal protection. Above all, SB 432 is bad public policy. Neither the people of Montana, nor small businesses, nor large law abiding businesses deserve the wrath caused in the wake of one irresponsible corporation, whose actions have resulted in the death and injury of so many good people in Libby and left the community to fend for itself as best it can, including through the courts -- where these people have obtained some measure of justice. Please don't take this from them. Thank you.

For your convenient reference I have attached at Tab 8 a summary of events relative to W.R. Grace's legacy in Libby. For further information please don't hesitate to contact me:

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Helena, Montana

DIVISION OF DISEASE CONTROL

A

REPORT ON AN INDUSTRIAL HYGIENE STUDY

OF THE

ZONOLITE COMPANY

OF

LIBBY, MONTANA

August 8-9, 1956

Conducted by:

Benjamin F. Wake
Industrial Hygiene Engineer
Division of Disease Control

Distribution:

This report is confidential
and is not for distribution
except to the management of
the Zonolite Company.

CONFIDENTIAL

This is a true and correct copy of a document on file in my office.

Andrea Vickory
Andrea Vickory, Mnt. Dept. of Environmental Quality

KNOWN ASBESTOS HEALTH HAZARDS

W.R. Grace/Zonolite: Report on an Industrial Hygiene Study of the Zonolite Company, Libby, Montana by the Montana State Board of Health
1956

[T]he asbestos dust in the dust in the air is of considerable toxicity, and is a factor in the consideration of reducing dustiness in this plant. According to Drinker and Hatch, the pathologic changes produced by asbestos are not like those of silicosis. The asbestos fiber group about the neck of the small air sacs in the lungs, and stimulate the formation of a diffuse fibrosis. There is no definite migration or transportation of the dust particles to the lymph nodes and no formation of the fibrin nodules. As the fibrosis increases, the reduction in lung area causes a serious decrease in lung capacity, or difficulty in breathing.

KNOWN ASBESTOS HEALTH HAZARDS

W.R. Grace Atty
W.R. Grace/Zonolite: Letter to John Hopkins from
S.Y. Larrick re Lilas Welch claim, November 25, 1967.

... the original plant inspection conducted in 1956
revealed a dust problem in the dry mill.

... plant inspections did reveal asbestos content ... *which*
did far exceed what were considered to be allowable
concentrations.

In 1962, dust samples revealed a high asbestos content,
and the board's conclusions at that time were that "no
progress had been made in reducing dust
concentrations in the dry mill to an acceptable level,
and that indeed the dust concentrations had been
increased substantially ...

A study of the information furnished by the State
Board would therefore make it appear that the
asbestos problem has existed certainly since 1956, and
generally with increasing severity.

Exhibit 92a (pp.1-2)

GRACE RESPONSE TO KNOWLEDGE

**W.R. Grace/Zonolite: Letter to John Hopkins from S.Y.
Larrick re Lilas Welch claim
November 15, 1967**

"You might wish to seriously consider a compromise settlement in hopes of in this matter avoiding the necessity of exposure of all the more damaging aspects of our own situation in the hearings rooms"

"keep them out of the hands of the Industrial Accident Board and the general public"

"the only persons aware of the studies are Zonolite officials and Dr. Little"

"avoid having evidence presented which would reveal and the extent and severity of the problem."

Exhibit 92a

KNOWN ASBESTOS HEALTH HAZARDS

**W.R. Grace/Zonolite: Memo to Kostic, Lovick, et al. from
Loss Control Consultant at Maryland Casualty Co.
December 16, 1969**

**Certainly when an x-ray picture shows a
change for the worse, that person must
be told and that person must be gotten
out of the environment which is
aggravating his condition. Failure to do
so is not humane and is in direct
violation of Federal law.**

Exhibit 136

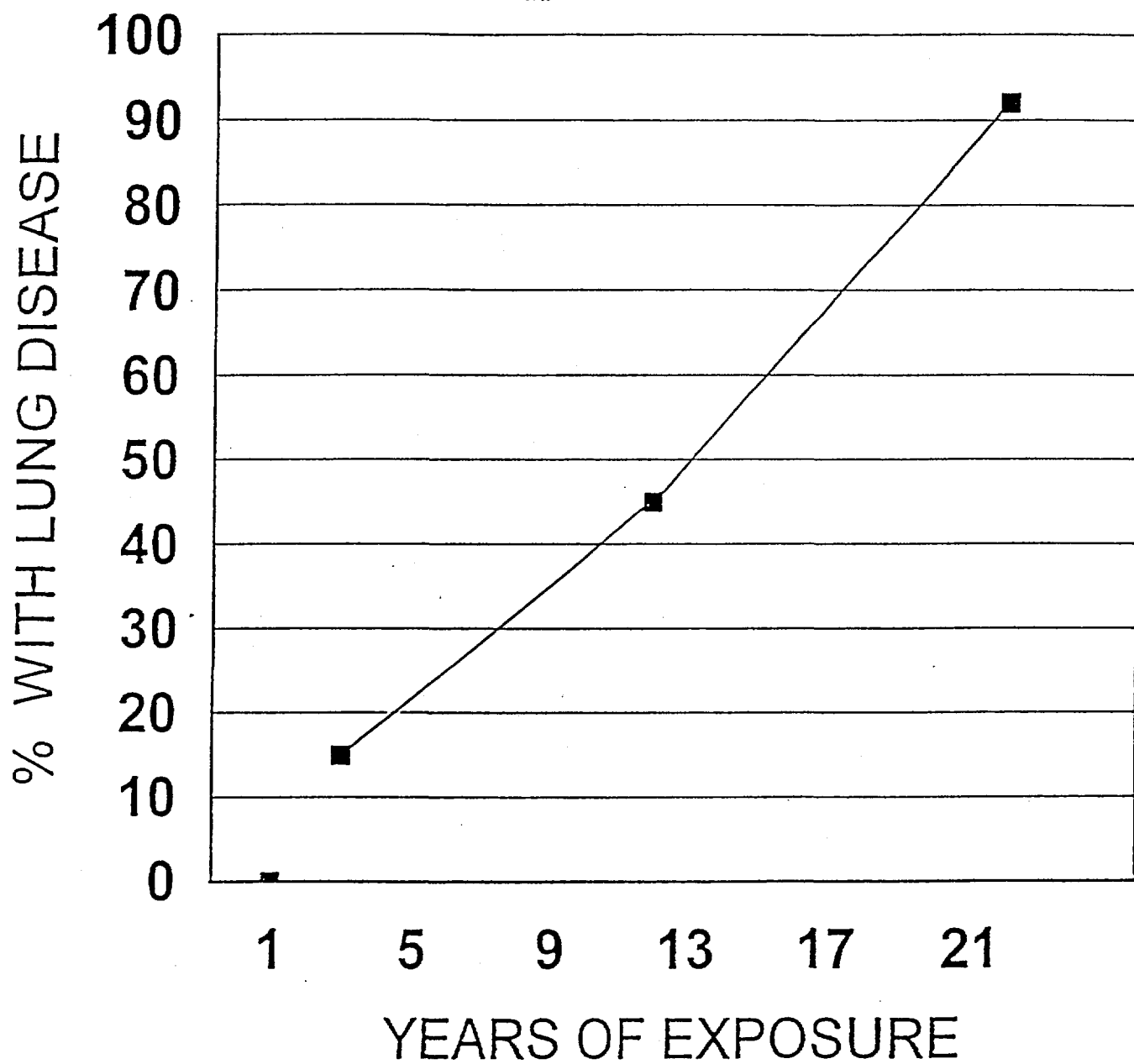
KNOWN ASBESTOS HEALTH HAZARDS

W.R. Grace/Zonolite: Confidential Study of
Zonolite/Libby Employees, Lovick et al.
(1969)

Although 17% of our 1 to 5 years service group have or are suspect of lung disease, there is a marked rise (45%) beginning with the 11th year of service, climbing to 92% in the 21 to 25 years service group. This suggests that chances of getting lung disease increase as years of exposure increase.

Exhibit 130.4

Workers with Disease



KNOWN ASBESTOS HEALTH HAZARDS

W.R. Grace/Zonolite: P. Kostic to R.W. Sterrett
January 5, 1968

Quote: "The Industrial Hygiene Foundation is currently circulating a communication which I have seen, proposing a 0.0 mppcf for asbestos dust. They apparently feel that any exposure to asbestos dust is hazardous. Many doctors are of the opinion that there is a definite relationship between asbestos dust and certain types of cancer."

(p.2)

* * *

If we minimize [Libby employees] exposure to a dust level not exceeding 5 mppcf chances are we may be able to keep them on the job until they retire, thus precluding the high cost of total disability.

(p.2)

Exhibit 99.3

ASBESTOS DEATHS - LIBBY WORKERS

Mesothelioma Deaths

Verle L. Olson	Ronald B. Johnson*	Clarence A. Peterson
Darrell Lockwood	Morland Baker	John B. Calkins
Michael S. McNair*	Edward Wittlake, Jr.	Hord M. Kimble, Jr.*
Robert L. Graham*		

Asbestosis Deaths

Glenn R. Taylor	Perley Vatland	Walter E. Baker
Charles M. Wagner	Lawrence A. Kins	Hord M. Kimble, Jr.*
Walter L. McQueen	Thomas B. Craver	Joseph K. Lyon
William E. Hedrick	Lloyd M. Miller*	Walter H. Dutton
William E. Smithers*	Orville G. Murray*	Lyle Warner
Orville D. Murray	Robert L. Weitzel	Robert W. Vinion*
Henry G. Hammer	Robert E. Dahms*	Ronald B. Johnson*
Lilas D. Welch	Michael S. McNair*	Raymond A. Belangie*
Jack W. Lewis, Sr.	Clyde C. Basham	Charles E. Carroll
Lyle E. Siefke	Lloyd P. Maynard	Morris H. Kair
Harvey R. Noble	Willis D. Fields*	Robert D. Thomson*
Billy J. Dorrington*	Raymond P. Carlson	George J. Oldham
Donald F. Peterson	Harold O. Shrewsbury	Rex E. Smith*
William E. Hostetler	Robert C. Stufflebeam	Donald A. Riley
Robert L. Graham*	Donald A. Johnson	

Lung Cancer Deaths

Rudolph C. Engle	Raymond C. Osborn	Otis L. Mast
John E. Ludwig	Raymond A. Bleich	William F. Shows
Jimmie A. Starr	William E. Smithers*	Lionel B. Van Horn
Edward D. Dinwiddie	Roy Dawson	Robert E. Cohenour
Harold D. Day	Ted R. Wright	Glenn W. Mitchell
Lloyd M. Miller*	Orville G. Murray*	Richard J. Rayome
John G. Parker	Robert E. Dahms*	James L. Gidley
Virgil P. Priest	Peter R. Powell	Kenneth L. Koehler
Herbert L. Waltman	Robert W. Vinion*	Calvin G. Henderson
Merle S. Everett	James D. Smith	John I. Kilpatrick
Raymond A. Belangie*	Clyde D. Snyder	Kenneth M. Fredericks
Ted M. Boyd	Willis D. Fields*	Robert D. Thomson*
Arnold L. Smith	Billy J. Dorrington*	Henry O. Schnetter
Gerald E. Nelson	Donald O. Howard	Rex E. Smith*
Robin V. Clark	Thomas O. Albert	Wesley Siefke

TOTAL DEATHS: 85

GRACE'S RESPONSE TO OD CLAIM

- 12/9/81. Don Riley filed OD claim.
- 3/3/87. Don's last day of work. (At that time, Grace's insurer was Transportation Insurance Co.)
- 3/24/87. Order of Determination issued by Workers' Comp. Div'n. that Don not disabled as a result of OD. Don appealed.
- 4/10/90. Hearing held in Kalispell before Arlyn Plowman, hearings examiner. Both parties conceded that Don had asbestosis and was permanently disabled, but contend that Don had other conditions besides asbestosis which were non-compensable. Wanted the Div'n. to apportion causation and benefits.
- 1/9/91. Findings of Fact/Conclusions of Law issued by Arlyn Plowman in Don's favor. 3/24/87 order reversed. Don totally disabled as a result of occupational exposure. Entitled to total permanent benefits and medical expenses, and costs and attorney fees.

Date	THE UNFOLDING OF EVENTS	Dead	Over 10 yrs work % abn
1930	Asbestosis well known in med lit. Bob Graham is age 3.		
1946	ACGIH 5 standard for asbestos - invisible.		
1953	Asbestos lung cancer is well established in med lit.		
1956	State Report - confidential. p.3 asbestos - "considerable toxicity". asbestosis. p.2 asbestos violations. p.4 dust control poor. co: serious hazard from asbestos.		
1959	State Report - confidential. p. 7 asbestosis - progressive. asbestos violations. 27% of dust is asbestos. dust control poor. Glenn Taylor is diagnosed with asbestosis. 36% abnormal on chest x-rays. Dr. Cairns: do physical exams. Dr. Little: "serious hazard". No to Dr. Knight's study.		
1961	3 dead of asbestosis.	3	
1962	State Report - confidential. no progress. asbestos violations. 2 workers diagnosed w/asbestosis. Bob Graham goes to work at Zonolite.	3	
1963	State Report - confidential. asbestos violations. dust control poor. Grace acquires Z. Knew about asbestos.	6	

Date	THE UNFOLDING OF EVENTS	Dead	Over 10 yrs work % abn
1964	<p>State Report - confidential. asbestos violations.</p> <p>p. 1 "extremely poor housekeeping"</p> <p>p. 2 7x lung cancer risk.</p> <p>p. 3 community hazard.</p> <p>p. 3 exhaust into service bldgs.</p> <p>Dr. Nelson diagnosed John Ludwig w/asbestosis.</p> <p>Dr. Nelson: 26% of 30 abnormal on lung function too.</p> <p>HQ: no to Dr. Nelson's study.</p>	6	46%
1965	<p>Bleich "very sorry record".</p> <p>Bob Graham from mine to garage.</p>	6	
1966	<p>HQ: no to Dr. Spicer study.</p> <p>Grace knew with each breath workers injured.</p>	8	
1967	<p>State order on dust.</p> <p>5000 lb of asbestos per day into air - rain.</p> <p>Shorty Welch diagnosed w/asbestosis.</p> <p>Larrick letter (attorney for Grace).</p> <p>p.1 cover</p> <p>p.2 "keep them out" State Reports.</p> <p>p.3 Dr. Little: "asbestosis". "severe problem".</p> <p>only persons aware.</p> <p>avoid disclosure.</p> <p>p.4 entire yard area permeated.</p> <p>p.5 any point where a dust condition may exist.</p> <p>p.5 avoid exposure of our own situation.</p> <p>p.7 exhaust into yard.</p> <p>Dr. Little "amazement".</p> <p>keep from union and public.</p> <p>Meeting at Johns-Manville in NJ.</p> <p>get physical exams.</p> <p>tell the workers.</p> <p>5 standard doesn't protect - Balzer (1967)</p> <p>respirators don't protect.</p>	8	

Date	THE UNFOLDING OF EVENTS	Dead	Over 10 yrs work % abn
1968	US Public Health Service inspection. asbestos violations. poor dust control. HQ: no to PHS death certificates study.	10	54%
1969	Report to Mr. Grace - tremolite asbestos is a "definite health hazard". Deal w/PHS - publish only if favorable to Grace. Trip to Lompoc. - HK, vacuum, baghouse Bob Graham is on list of men to protect. HQ Kostic study - confidential. 45 have lung disease. 92% with 21-25 years work. HQ memo: <i>New Yorker</i> article. meso in housewives and workers.	12	33%
1971	Bureau of Mines inspection - 90 violations. memo: extraordinary hazard. Chart 9, violations of asbestos standard. Grace never did pass an inspection. block chart on violations of 5 standard	14	53%
1972	HQ: no talk policy. Kostic - tell the workers?	14	59%
1973	Bureau of Mines inspection - 71 violations. Chart: inspections outside dry mill-garage. Bob Graham 11 years at Grace. dry mill - on variances. no to medical studies. concealed medical info. concealed state reports. no talk policy. not told workers. by 1973 the disease process is in motion.	16	59%
1975	drymill closed	19	63%
1977	Grace in-house study: Lung cancer 5x; 41% with asbestosis. HQ: no to McMahon study. HQ: "none of us believe that we should proceed as we have in the past, w/o an education program".	23	53%

Date	THE UNFOLDING OF EVENTS	Dead	Over 10 yrs work % abn
1978	HQ: no to Dr. Iron's study proposal. HQ: Dr. Irons will "blow the whistle".	28	58%
1979	Grace told the workers of the asbestos hazard.	30	51%
1980	HQ: Block NIOSH study.	32	47%
1990	Bob Graham retired. Demolition without protection for the workers.	63	
1994	EPA demolition fine \$510,000.	79	
1998	Bob Graham died.	88	